IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL WRIT PETITION NO.546 OF 2004

M/s. Desai Traders ...Petitioners.

V/s

Mahalaxmi Tyres & Auto
Services and Others ...Respondents

Mr. A.B. Vagyani for the Petitioner.
Mr. Pankaj J. Das with Vardha P. Desai for respondent Nos. 1 and 2.
Mr N.R. Bubna for respondent No.3.

CORAM: V.M.KANADE,J.

DATE: 2nd March, 2005

P.C.:

1. Petitioner is the original complainant and the respondent No.1 is the partnership firm and respondent Nos. 2 and 3 are the partners of respondent No.1.

2. Petitioner is challenging the order passed by the Sessions Court in Criminal Appeal No. 90 of 2001 whereby the Sessions Court partly allowed the appeal, set aside the order of conviction passed by the Judicial Magistrate, First Class in Summary Criminal Case No.16441 of 1997 and directed the Judicial Magistrate to retry the case afresh.

3. It is the case of the petitioner that the petitioner had supplied rubber to the respondent No.1

and four cheques were issued by the respondent No.1 towards the price of the rubber sold to them. The cheques, however, were dishonoured with the remark "insufficient funds". A demand notice was issued and in spite of service of demand notice, respondent No.1 failed to pay the dues to the petitioner and a complaint under section 138 of the Negotiable Instruments Act was filed. The Trial Court after perusing the evidence on record convicted the respondent Nos. 2 and 3 for an offence under section 138. Against the said order, respondent No.1 and 3 preferred an appeal before the Sessions Judge, Kolhapur. The Lower Appellate Court came to the conclusion that the Trial Court had committed a serious error while recording the statement of the accused under section 313 of the Criminal Procedure Code and, therefore, serious injustice was caused to the respondents. The Trial Court, therefore, remanded the matter back to the Trial Court for retrial.

4. The learned Counsel appearing for the petitioner submitted that the Lower Appellate Court, at the highest, could have remanded the matter back only for the purpose of recording statement of the accused under section 313 and ought not to have directed a fresh trial. It is further submitted that merely

because there is some error in the recording of statement under section 313, the entire trial is not vitiated. In support of the said submission the learned Counsel appearing on behalf of the petitioner has relied upon the judgment of Division Bench of this Court in the case of Bhavlal Shanker Mahajan Vs. State of Maharashtra reported in 1997 CRI.L.J. 3060.

5. The learned Counsel appearing on behalf of the respondents 1 to 3 vehemently opposed the submissions made by the learned Counsel appearing for the petitioner. It is submitted that the statement of the accused was not recorded as provided under section 313 of the Criminal Procedure Code and as a result a serious prejudice was caused to the accused.

6. I have heard both the learned Counsel for the petitioner and respondents 1 to 3 at length. I have perused the order passed by the Lower Appellate Court. The Lower Appellate Court has observed in its judgment that under the provisions of section 259 of the Criminal Procedure Code, in a case which is ordinarily triable as summons case, it is open to the Magistrate that in the interest of justice the offence should be tried in accordance with the provisions for trial of warrant cases and such Magistrate may proceed to

re-hear the case in the manner provided for trial of warrant cases. The Sessions Court has observed that the Magistrate has not followed the said procedure while converting the summons case into warrant case and, therefore, had committed material irregularity in the trial. Further, the Sessions Court observed that the statement of the case was recorded in English. However, name of the accused whose statement is recorded is not mentioned in the statement. Further, signature of the accused has not been taken. The Sessions Court has further observed that for recording statement of the accused, procedure as laid down in section 281 of the Criminal Procedure Code has to be followed and sub-section 3 of section 281 provides that the recording of statement of the accused should be in the language in which the accused was examined. Further, the Lower Appellate Court has observed that under section 313 of the Criminal Procedure Code, the statement has to be recorded. The Sessions Court has observed that the Magistrate has failed to explain all the incriminating circumstances which have appeared in evidence against the accused.

7. In my view, the finding of Lower Appellate Court cannot be sustained. Section 465 of the Criminal Procedure Code reads as under:-

"465. Findings or sentence when reversible by reason of error, omission or irregularity-(1) Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered by a Court of appeal, confirmation or revision on account of any error, omission or irregularity in the complaint, summons, warrant, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code, or any error, or irregularity in any sanction for the prosecution, unless in the opinion of that Court, a failure of justice has in fact been occasioned thereby.

(2) In determining whether any error, omission or irregularity in any proceeding under this Code, or any error, or irregularity in any sanction for the prosecution has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings."

8. From the perusal of section 465 it can be seen that the finding, sentence or order passed by the Court of competent jurisdiction cannot be reversed or altered by the Court of appeal on account of any error, omission or irregularity in the proceedings before or during trial, unless in the opinion of the Court the failure of justice has in fact occasioned. Further, sub-clause 2 clearly stipulates that the court shall also have regard to the fact that whether the said objection has been raised at the earlier stage of the proceedings. It is obvious that the section casts/stipulates that the sentence or finding of the Lower Appellate Court should not be reversed only on the basis of irregularity in following the procedure and that if at all such an irregularity has been committed, the Court has to see whether objection has been taken earlier. It may be seen from the judgment and order of the Trial Court that all these submissions which are made before the Lower Appellate Court were never raised before the Trial Court. The Trial Court has given a reasoned order and has recorded a finding and sentence after considering the documents on record and the submissions made by both parties. Thus, the submission made in the Lower

Appellate Court were raised for the first time.

9. Apart from that, section 281 lays down that whenever the accused is examined by a Metropolitan Magistrate, the Magistrate shall make a memorandum of the substance of the examination of the accused in the language of the Court and such memorandum shall be signed by the Magistrate and shall form part of the record. Sub-clause (3) of section 281 lays down that the record shall, if practicable, be in the language in which the accused is examined or, if that is not practicable in the language of the Court. Thus the said provision gives discretion to the Magistrate over recording the memorandum in the language of the Court or if it is practicable in the language of the accused. In the present case, memorandum of the accused is recorded in the language of the Court and has been signed by the Magistrate.

10. In my view, therefore, the Lower Appellate Court had clearly erred in remanding the matter to the trial court for a fresh trial by altering and reversing the sentence and finding recorded by the Trial Court. It was open for the Lower Appellate Court to have corrected the mistake if any committed by the Magistrate and the Lower Appellate Court also should

have considered the provisions of section 465 of the Criminal Procedure Code and should have considered whether such an objection has been raised at the earliest available opportunity or not and also ought to have seen whether irregularity if any had occasioned failure of justice. The impugned order is therefore set aside. The Lower Appellate Court is directed to decide the appeal on its own merits after considering the provisions of section 465. All questions which were raised in the trial court and in this Court are kept open. The Lower Appellate Court is directed to decide the appeal as expeditiously as possible and, in any case, within a period of six months.

V.M. KANADE, J.